Supreme Court, U.S.
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No.

In the Supreme Court of the United States

DARYOUSH RAHSEPARIAN, A/K/A STEVE RAHSEPARIAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the rule in *Bruton* v. *United States*, 391 U.S. 123 (1968), applies to inferentially incriminating statements by a non-testifying co-defendant when those statements explicitly name the defendant and add substantial weight to the prosecution's case on a key element of proof.

RULE 14.1(b) STATEMENT

The following were the parties to the proceeding in the Court of Appeals for the Tenth Circuit:

1. Steve Rahseparian, defendant-appellant;
2. Ardie Rahseperian, defendant-appellant;
3. and the United States of America, plaintiff-appellee.

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PETITION FOR A WRIT OF CERTIORARI

Steve Rahseparian respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion (App., *infra*, 1a-20a) is reported at 231 F.3d 1267 (10th Cir. 2000). The order of the court of appeals denying rehearing (App., *infra*, 26a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 2000. App., *infra*, 1a-20a. A timely petition for rehearing was denied on December 21, 2000. App., *infra*, 26a. A petition for stay of the mandate pending the filing and disposition of a certiorari petition was granted on January 2, 2001. App., *infra*, 21a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

STATEMENT

In *Bruton* v. *United States*, 391 U.S. 123 (1968), this Court held that "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of the failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Id.* at 135. "Such a context," the Court decided, "is presented here, where the powerfully incriminating extra-judicial statements of a co-defendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect * * *. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination." *Id.* at 135-36.

In the years since *Bruton* was decided, this Court and others have repeatedly sought to determine precisely which "extra-judicial statements of a co-defendant" are sufficiently "powerfully incriminating" that limiting instructions are not enough to shield the defendant from prejudice. In *Richardson* v. *Marsh*, 481 U.S. 200 (1987), the Court held that where the statement at issue is so completely redacted as not even to refer to the defendant, it does not fall within *Bruton*. More recently, in *Gray* v. *Maryland*, 523 U.S. 185 (1998), the Court held that an otherwise "powerfully incriminating" statement does not lose its prejudicial impact merely because the prosecution substitutes a neutral pronoun or symbol for the defendant's name.

But the courts of appeals remain divided on the question presented in this case: Whether, and if so under what circumstances, a non-testifying co-defendant's hearsay statement that explicitly names the defendant, but whose content incriminates the defendant only by virtue of inferences to be drawn from surrounding evidence, falls within *Bruton*. This Court's decision in *Gray* suggested that some inferences

are so "obvious" (523 U.S. at 196) that *Bruton* remains applicable; yet in the wake of *Gray*, the circuits remain in disagreement about when, if ever, an inferentially incriminating statement may run afoul of the rule in *Bruton*. The court below, joining the D.C. Circuit, concluded that statements whose content is "only inferentially incriminating" do not fall within *Bruton* at all. The Fifth and Eleventh Circuits, by contrast, take a more nuanced view — flatly rejecting the proposition that "inferentially incriminating" statements can ***never*** be precluded by *Bruton*, and asking instead whether the inference at issue is "direct" (in which case *Bruton* applies) or is "several inferential jumps" away (*United States* v. *Lage*, 183 F.3d 374, 388 (5th Cir. 1999)) (in which case *Bruton* does not apply).

This case provides an ideal vehicle to resolve this important and recurring issue. Over petitioner's vehement objection — and despite a warning beforehand from the trial judge — the government elicited from a federal agent postarrest statements made by petitioner's own brother, accusing petitioner of directing him to make the allegedly fraudulent phone calls, and characterizing petitioner as untrustworthy. The court of appeals nevertheless held that the challenged statements were "'outside the scope of *Bruton's* rule'" (App., *infra*, 19a) because they were "only inferentially incriminating." *Id.* at 18a. That conclusion is at odds with this Court's cases and draws a wholly untenable distinction between "facially" and merely "inferentially" incriminating statements. Further review is warranted.

1. On April 22, 1998, a federal grand jury in the Western District of Oklahoma indicted Steve and Ardie Rahseparian, and their father Jack, on thirteen counts of conspiracy in violation of 18 U.S.C. § 371, mail fraud in violation of 18 U.S.C. §§ 1341 and 2, and money laundering in violation of 18 U.S.C. §§ 1956(a)(1)(B)(i) and 2. The government alleged that the three defendants had engaged in a telemarketing scheme designed to obtain money from customers in return for merchandise of modest value and prizes that were never

delivered. App., *infra*, 2a All three defendants were jointly tried before a jury.

The evidence at trial was close and hotly contested; indeed, the court below found the evidence legally insufficient against Jack Rahseparian and therefore vacated his convictions. *United States* v. *Rahseparian*, 231 F.3d 1257, 1264 (10th Cir. 2000). As to petitioner, the trial turned heavily on the question whether Steve Rahseparian had formed the requisite intent to commit the charged offenses. A key to the government's proof on this element was the testimony of Special Agent Sharon Morissette, who testified about her 1996 interrogation of Steve's brother and co-defendant, Ardie Rahseparian, at Ardie's Chicago apartment. During the examination of Morissette, the prosecutor — despite her assurances that she would not elicit testimony in violation of *Bruton* v. *United States*, 391 U.S. 123 (1968) — induced the agent to state that Ardie Rahseparian had made two separate out-of-court statements incriminating Steve Rahseparian, both in direct violation of *Bruton* (statements indicated in bold):

Q: [MRS. POARCH]

[D]id you ask [Ardie Rahseparian] about Genesis Marketing?

A: [AGENT MORISSETTE] Yes.

Q: And what did he tell you?

A: He told me that he was employed as a sales rep for Genesis Marketing for a period of time.

Q: And did he tell you about — anything about the initiation of it or the start-up of it?

A: Yes, he did.

Q: What was that?

A: He said that he had been asked to make phone calls — to make sales calls for the company by his brother Steve.

Q: And did he express that before the start-up that he expressed any hesitation?

A: Yes. He said that he was reluctant to get involved.

Q: And why was that?

A: He said that he didn't trust his brother.

App., *infra*, 22a-25a.

Sustaining defense counsel's objection, the trial court ruled that the "whole colloquy" — including the two objectionable statements — was a "very, very clear case" of *Bruton* error. *Id.* at 25a. But rather than declare a mistrial, the trial court simply instructed the jury to disregard the testimony (the very remedy that this Court in *Bruton* held could *not* suffice to purge the error).

2. The court of appeals affirmed. App., *infra*, 21a. The court did not dispute that the challenged statements touched upon the "key issues in the case" — in particular, whether Steve "is the type of person who would have the intent to commit fraud and launder money." *Id.* at 18a. The court concluded, however, that Ardie Rahseparian's statements — as conveyed by Agent Morissette — were not ones "to which the narrow *Bruton* rule applies." *Id.* In the court's view, Ardie's statements were "only inferentially incriminating" (*id.*), and were therefore "'outside the scope of Bruton's rule.'" (*id.* at 19a) (quoting *Gray* v. *Maryland*, 523 U.S. 185, 195 (1998)). Relying on *Gray* and *Richardson* v. *Marsh*, 481 U.S. 200 (1987), the court of appeals held that the trial court's instructions — which directed the jury to disregard the statements — had "cured any possible prejudice." (*id.* at 19a-20a).

REASONS FOR GRANTING THE WRIT

The Tenth Circuit held in this case that an extra-judicial statement that is "only inferentially incriminating," App., *infra*, 18a — *i.e.*, whose incriminating force requires drawing inferences from the statement — ***never*** triggers *Bruton* protection. Although that narrow view of *Bruton* is shared by the D.C. Circuit, it is in conflict with decisions of the Fifth and Eleventh Circuits. The court of appeals' decision also is inconsistent with this Court's case law (on which the Tenth Circuit purported to rely).

What is more, the decision below takes an implausibly narrow view of a defendant's rights under the Confrontation Clause. In the court of appeals' view, *Bruton* extends only to statements that on their face are tantamount to full-blown confessions, *i.e.*, statements that are so damaging and so all-encompassing as to constitute proof of the defendant's guilt beyond a reasonable doubt if believed by a jury. But incriminating statements by co-defendants actually come in shades of gray. At one end of the spectrum are statements like those specifically excluded in *Bruton* and *Gray* v. *Maryland*, 523 U.S. 185 (1998); such statements both name the defendant and, without recourse to any inferences at all, establish that he committed the crime. See, *e.g.*, *Bruton*, 391 U.S. at 124; *Gray*, 523 U.S. at 195. At the opposite end of the spectrum are statements that plainly fall outside the scope of *Bruton*, such as the statement at issue in *Richardson* v. *Marsh*, 381 U.S. 200 (1987); such statements do not name the defendant at all, much less prove any participation by the defendant in the offense. This case, however, presents for resolution a question not resolved by this Court's *Bruton* case law: Whether (and, if so, under what circumstances) statements like the extra-judicial comments by the co-defendant in this case — that are not tantamount to a confession but that explicitly name the defendant and substantially assist the government, through simple inferences, in proving a hotly contested element of its case — are covered by *Bruton*. The Tenth Circuit held in

substance that statements that do not facially inculpate the defendant on all elements of the crime — but instead incriminate him on one or more elements by an inference — are outside the scope of the rule in *Bruton*.

That cannot be correct. Where, as here, the inferential step required to view the statement as highly inculpatory is so small as to be no step at all, and the prejudicial impact is severe, the constitutional protections undergirding *Bruton* are no less implicated. Especially because *Bruton* challenges are commonplace in both federal and state courts, further review is clearly warranted.

A. The Tenth Circuit's Decision Deepens A Conflict Among The Circuits

This Court has not had occasion to address whether the rule in *Bruton* v. *United States*, 391 U.S. 123 (1968), applies to an extra-judicial statement by a co-defendant that explicitly names the defendant and adds substantial weight to the government's case on a key element of proof, but only on the basis of inferences drawn from the statement.[1] The circuits, however, are deeply divided on this exact question. See Benjamin E. Rosenberg, *The Future of Codefendant Confessions*, 30 Seton Hall L. Rev. 516, 528-29 (2000) (describing confusion among the circuit courts on this aspect of the rule in *Bruton*).

The question presented in the petition is a natural outgrowth of the question on which this Court granted

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[1] Neither of the two decisions by this Court cited in the Tenth Circuit's opinion addressed the question whether highly inculpatory statements by a co-defendant amounting to something short of a full-blown confession nonetheless triggers *Bruton* protection. The statement in *Richardson* v. *Marsh*, 481 U.S. 200 (1987), did not even refer to the defendant by name, much less implicate him in any criminal activity. See *id.* at 202. And the partially redacted statement in *Gray* v. *Maryland*, 523 U.S. 185 (1998), which substituted a neutral pronoun or symbol for the defendant's name, was found to be the functional equivalent of the statement in *Bruton*, which actually named the defendant as having committed the crime. See *id.* at 194.

certiorari in *Gray*. In *Gray*, this Court granted certiorari to decide whether the rule in *Bruton* applies to a statement that directly incriminates the co-defendant, but because of redaction an inference must be drawn about the ***identity*** of the ***defendant***. The *Gray* Court answered that question in the affirmative. In this case, the question of inference applies not to the identity of the defendant but rather to the ***content*** of the ***statement itself***. Some circuits have held that *Gray's* extension of *Bruton* to inferences is not limited solely to the identity of the defendant but also includes statements whose content incriminates by inference. The Tenth Circuit (in this case) and another court of appeals have rejected this view, finding *Bruton* inapplicable to such inferentially incriminating declarations. This Court should grant certiorari to resolve this circuit conflict.

As noted above, the Tenth Circuit in this case held that the rule in *Bruton* is inapplicable to co-defendants' statements that are "only inferentially incriminating." App., *infra*, 18a. The D.C. Circuit has taken a similarly narrow view.

In *United States* v. *Wilson*, 160 F.3d 732 (D.C. Cir. 1998), the court of appeals held that a co-defendant's statement that explicitly "named" the defendant and helped prove the government's case was "not the sort of statement under *Bruton* or *Gray* that would require * * * exclusion." *Id.* at 740 n.5. Like the Tenth Circuit in the present case, the D.C. Circuit held that "statements that incriminate only inferentially are outside the scope of *Bruton*." *Id.* The court reasoned that, although the statement strongly inculpated the defendant, it did not do so "'facially'" but "only when linked with other evidence at trial." *Id.*

By contrast, the Fifth Circuit has held that, in the wake of *Gray*, *Bruton* extends even to statements whose incriminating ***content*** (as opposed to merely the ***identity*** of the defendant) depends on drawing some inferences from surrounding evidence. In *United States* v. *Lage*, 183 F.3d 374 (5th Cir. 1999), the court considered a postarrest statement in which a non-testifying co-defendant had placed the defendant at the

scene of the crime at approximately the time of the offense, and stated further that the defendant had jumped on top of him just before the police arrived. Although both statements took on their inculpatory meaning from context — and neither was "facially" incriminating — the Fifth Circuit did not simply reject defendant's *Bruton* claim out of hand (as the Tenth Circuit would have done). To the contrary, the court recognized that at least "some inferentially incriminating statements" implicate *Bruton*. *Id.* at 388; see *id.* (*Bruton* requires a court to examine the degree to which the "content of the statement" incriminates by inference). The court adopted a nuanced approach to the issue, asking whether the statement at issue provided a "direct" link to the defendant (even if through inference) or instead would require "the jury [to] make[] several inferential jumps." *Id.* Applying that principle, the court found that one of the statements at issue — the one alleging defendant's evasive actions at the time the police arrived — "present[ed] a * * * difficult question" under *Bruton*. *Id.* The court therefore turned to a "harmless error analysis" (*id.*) — the very analysis pretermitted by the Tenth Circuit's approach to the issue.

The Eleventh Circuit has sided with the Fifth Circuit. In *United States* v. *Doherty*, 233 F.3d 1275 (11th Cir. 2000), the government introduced out-of-court statements by the co-defendant that, like the statements in this case, did not, on their own, demonstrate the defendant's guilt, but nonetheless served as powerful evidence of the defendant's criminal intent. *Id.* at 1279. On appeal, the government made exactly the same argument it did in this case, namely that application of the *Bruton* rule requires a "clear confession" which, on its face, if believed by a jury, would constitute proof of the defendant's guilt beyond a reasonable doubt. *Id.* But the Eleventh Circuit in *Doherty* firmly rejected this argument, concluding that *Bruton* was implicated because the challenged statements "named" the defendant and "linked him to the transactions at issue." *Id.* at 1282.

This case is an ideal vehicle for resolving the conflict. Ardie Rahseparian's extra-judicial statements — adduced through the hearsay testimony of Agent Morissette — named petitioner explicitly and, although only inferentially incriminating, were absolutely devastating. Through the statements, petitioner's co-defendant (his brother) accused petitioner of directing him to engage in the allegedly illegal telemarketing scheme and stated that he was suspicious of petitioner's request because he regarded his brother as untrustworthy. In a mail fraud and conspiracy case — where state of mind is so central — what could be more damning than statements indicating that the defendant was the mastermind of the unlawful scheme and that petitioner's brother believed he had a criminal predisposition? Yet by the Tenth Circuit's lights, these statements do not implicate *Bruton* at all, simply because the prejudicial effect requires ***some*** degree of inferential thinking by the jury. The Fifth and Eleventh Circuits have taken the opposite view. Further review is plainly warranted.

B. The Question Presented Has Important and Recurring Implications For Innumerable Criminal Defendants Seeking To Protect Their Rights Under The Confrontation Clause

Joint trials, this Court has emphasized, "'play a vital role in the criminal justice system.'" *Zaifro* v. *United States*, 506 U.S. 534, 537 (1993) (quoting *Richardson* v. *Marsh*, 481 U.S. 200, 209 (1987)). And in such joint trials, incriminating statements "by one or more of the defendants are commonplace * * * since each [defendant] has reduced assurance that he will be protected by his own silence." *Marsh*, 481 U.S. at 209-10. As a result, *Bruton* challenges by defendants are routine. Indeed, *Bruton* challenges are among the most frequently litigated procedural claims in federal and state criminal practice.[2]

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[2] See, *e.g.*, *United States* v. *Lopez-Caceres*, 89 F. Supp. 2d 168, 171-72 (D. Puerto Rico 1998); *United States* v. *Rucker*, 32 F. Supp. 2d 545, 550 (E.D.N.Y. 1999); *United States* v. *Walters*, 188 F.R.D. 591, 600-01 (D. Kan.

How *Bruton* applies to various kinds of co-defendant statements is thus of crucial practical significance to the administration of justice. Co-defendant statements, after all, come in all shapes and sizes. Some (as here) name the defendant expressly. Some (again, as here) bear critically, if "only inferentially" (App., *infra*, 18a), on one or more elements of the crime. Co-defendant statements can, and often are, "powerfully incriminating" (*Bruton*, 391 U.S. at 128) without being facially tantamount to a full-blown confession. Whether, and to what extent, the rule in *Bruton* covers such statements is a recurring issue of the highest practical importance.

So, too, of course, are the underlying constitutional rights at stake. As this Court has explained, the Confrontation Clause right of cross-examination is of paramount importance and embodies a fundamental right guaranteed to the accused. "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the requirement or [right] of confrontation and cross-examination is an essential and fundamental right for the kind of fair trial which is this country's constitutional goal." *Pointer* v. *Texas*, 380 U.S. 400, 405 (1965); accord *Berger* v. *California*, 393 U.S. 314, 315 (1969); *Barber* v. *Page*, 390 U.S. 719, 721 (1968); *Kirby* v. *United States*, 174 U.S. 47, 55-56 (1899).

In fact, this Court's cases "recognize that this truth-finding function of the Confrontation Clause is uniquely threatened

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1999); *United States* v. *Andreas*, 23 F. Supp. 2d 835, 844-45 (N.D. Ill. 1998); *United States* v. *Singh*, 973 F. Supp. 7, 14-15 (D. D.C. 1997); *Ortega* v. *United States*, 897 F. Supp. 771, 778-79 (S.D.N.Y. 1995); *United States* v. *Giampa*, 904 F. Supp. 235, 267-68 (D. N.J. 1995); *United States* v. *Washington*, 819 F. Supp. 358, 363 (D. Vt. 1993); *United States* v. *White*, 766 F. Supp. 873, 887-88 (E.D. Wa. 1991); *Davis* v. *State*, 528 S.E.2d 800 (Ga. 2000); *Gabow* v. *Commonwealth*, 34 S.W.2d 63 (Ky. 2000); *State* v. *Brewington*, 532 S.E.2d 496, 509-10 (N.C. 2000); *State* v. *Robertson*, 760 A.2d 82, 100 (Conn. 2000); *People* v. *Fletcher*, 13 Cal. 4th 451, 456 (1996); *State* v. *Tucker*, 861 P.2d 24, 28 (Hawaii App. 1993); *Foster* v. *United States*, 548 A.2d 1370, 1374 (D.C. App. 1988).

when an accomplice's [incriminating statements] are sought to be introduced against a criminal defendant without the benefit of cross-examination." *Lee* v. *Illinois*, 476 U.S. 530, 541 (1986); see also *Douglas* v. *State of Alabama*, 380 U.S. 415, 419 (1965) (conviction reversed because incriminating statement made by accomplice was read to the jury by the prosecutor and accomplice subsequently invoked his privilege against self-incrimination). Indeed, the *Bruton* decision itself "illustrates the extent of [this] Court's concern that the admission of this type of evidence will distort the truth-finding process." *Lee*, 476 U.S. at 542. The Tenth Circuit's decision relegates these concerns to a back seat, creating an artificial — and ultimately untenable — distinction between statements whose content incriminates "facially" and those whose content incriminates "only inferentially." In countless circumstances, as in this case, the inferentially incriminating statement by a non-testifying co-defendant can be every bit as damaging as the out-of-court statement that incriminates without regard to any other evidence in the case. The Court should grant review to provide guidance in this critical area of criminal procedure.

C. The Tenth Circuit's Decision is Wrong

The Tenth Circuit's conception of the rule in *Bruton* is fundamentally at odds with *Bruton* itself. The *Bruton* Court recognized that incriminating statements by a non-testifying co-defendant that "add[] substantial, perhaps even critical weight to the Government's case" necessarily implicate the Confrontation Clause. 391 U.S. at 128. Indeed, the *Bruton* Court concluded that the exclusion of the co-defendant's statement was justified if it posed merely a "'substantial threat[]'" to the defendant's confrontation rights by bolstering the government's proof. *Id.* at 137 (quoting *Jackson* v. *Denno*, 378 U.S. 368, 389 (1964)). By its terms, then, *Bruton* extends to incriminating statements by a co-defendant that do not amount to a "facially" complete confession of guilt by the defendant himself. Instead, the rule in *Bruton* covers even

those statements that substantially assist the government in proving the defendant's guilt on a key element of the offense, whether inferentially or directly. Yet the narrowing principle endorsed and applied by the Tenth Circuit ignores the full sweep of the *Bruton* decision. As a result, an important and recurring class of powerfully, if inferentially, incriminating statements will be exempted from the scrutiny that *Bruton* demands.

This case illustrates the consequences. Through the extra-judicial comment, the jury was permitted to hear Ardie say that Steve directed him to make the (allegedly misleading) phone calls, and that Ardie was reluctant to do so because of his distrust of his brother Steve. These devastating remarks — which, under *Bruton*, the jury must be presumed to have used against Steve — were a crucial, but completely improper, piece of proof relied upon by the government to satisfy its burden. The statements bolstered the credibility of a key government witness (Brad Russell) by confirming for the jury that it was Steve who had told Ardie to make the sales calls to customers in the first place. See, *e.g.*, *Bourjaily* v. *United States*, 483 U.S. 171, 179 (1987) (evidence gains probative force from surrounding evidence). As important, the statements cast a pall on Steve's reputation for trustworthiness in a case that hinged on whether the jury believed petitioner intended to run a legitimate enterprise or an unlawful scheme.

The introduction of Ardie's extra-judicial comment "added substantial, perhaps even critical weight to the Government's case in a form not subject to cross-examination." *Bruton*, 391 U.S. at 128. In substance, the government improperly used the *Bruton* statements to fill its evidentiary gap on the critical element of whether Steve had the requisite scienter for the charged offenses. It is difficult to see how Ardie's hearsay

statements could more "expressly implicate [] the defendant as his accomplice." *Marsh*, 481 U.S. at 208.[3]

The Tenth Circuit rested its narrow view of *Bruton* on this Court's most recent explication of the *Bruton* rule in *Gray* v. *Maryland*, 523 U.S. 185 (1998). But far from supporting the court of appeals' construction, this Court in *Gray* expressly cautioned that in applying *Bruton* "inference pure and simple cannot make the critical difference." 523 U.S. at 195. Rather, it is "***the kind of, not the simple fact of, inference***" that matters for *Bruton* purposes. *Id.* at 196 (emphasis added). As the Fifth Circuit has observed, *Gray* means that *Bruton* applies even when "the ***content*** of the statement is incriminating only if the jury draws certain ***inferences*** from it." *Lage*, 183 F.3d at 387 (emphasis added); See generally, Rosenberg, *supra*, at 528-29 (approving the Fifth Circuit's understanding of *Bruton*, as explicated in *Gray*).

The Tenth Circuit is wrong for another reason. By creating a dispositive distinction between inferentially and "facially" incriminating statements, the Tenth Circuit appears to have applied the functional equivalent of a harmless error analysis as a proxy for whether *Bruton* applies at all in the first instance. App., *infra*, 20a (concluding that the co-defendant's statements were not "'obviously important' to the government's case"). But this is putting the cart before the horse. A court should ask first whether the challenged statements "add[] substantial" weight to the government's case, *Bruton* (391 U.S. at 128), whether facially or by a closely linked inference. If so, *Bruton* applies. Only then should a court address whether, all things considered, the potential misuse of such evidence by the jury is

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[3] What is more, because the court below concluded that Ardie's statements did not implicate *Bruton* at all, it declined (App., *infra*, 20a n.4) to consider whether there was any cumulative effect of that error and a separate constitutional violation (the prosecutor's impermissible comment on petitioner's failure to testify, in violation of the rule in *Griffin* v. *California*, 380 U.S. 609 (1965)).

harmless beyond a reasonable doubt in light of all the evidence. See *Chapman* v. *California*, 386 U.S. 18 (1967) (harmless error analysis applies to *Bruton* violations); see also *Schneble* v. *Florida*, 405 U.S. 427 (1972) (same); *Harrington* v. *California*, 395 U.S. 250 (1969) (same). Such a traditional two-step approach — which is exactly the approach followed by the Fifth Circuit in *Lage* — does not disturb convictions that are supported by abundant evidence of guilt, while retaining the vitality of the protections afforded by the Confrontation Clause. See *Lage*, 183 F.3d at 387.

The *Bruton* error, standing alone, required a new trial for Steve Rahseparian. Because the Tenth Circuit erroneously held that the rule in *Bruton* was inapplicable in this case, it declined to engage in the appropriate harmless error analysis at all. Because a *Bruton* error is one of "constitutional dimension," it cannot be held harmless unless "the properly admitted evidence of guilt is so overwhelming and the prejudicial effect of the co-defendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error." *Parker* v. *Randolph*, 442 U.S. 62, 70 (1979). No such conclusion can plausibly be drawn on this record.[4] The court of appeals' decision is clearly wrong and should be reversed.

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[4] Although Steve Rahseparian did, to be sure, order and ship merchandise used in the operation, there is no evidence that he ever spoke with (or misled) customers, and little evidence (nearly all of it from Brad Russell, a highly impeachable source) that he ever agreed or intended to defraud customers by failing to send out products or awards. Indeed, much of the evidence in the record shows that all three defendants intended to run a legitimate business; why Steve failed to send out relatively inexpensive promised goods (if indeed he did) is unexplained in the record. Without such evidence, the proof of Steve's scienter is insufficient. In no sense was the evidence against Steve Rahseparian "overwhelming."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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MARCH 2001

APPENDIX A

United States Court of Appeals,
Tenth Circuit.

UNITED STATES of America,
Plaintiff – Appellee,

v.

Daryoush RAHSEPARIAN, also known as Steve Rahseparian, and Ardashir Rahseparian, also known as Ardie Rahseparian,

Defendants – Appellants.

Nos. 99-6050, 99-6052.

[Filed Nov. 7, 2000.]

MEMORANDUM OPINION

Before SEYMOUR, Chief Judge, TACHA and BRISCOE, Circuit Judges.

SEYMOUR, Chief Judge.

After a joint jury trial, co-defendants Ardashir (aka Ardie) and Daryoush (aka Steve), along with Jalal (aka Jack) Rahseparian, were convicted of conspiracy to commit mail fraud, mail fraud, and money laundering. All three appealed. Jack's appeal is addressed in the companion opinion, *see United States v. Rahseparian,* 231 F.3d 1257 (10th Cir. 2000). Ardie contends on appeal that the evidence is insufficient to sustain his conviction. Ardie and Steve contend a new trial is necessary due to the prosecutor's comment on their failure to testify in violation of *Griffin v. California,* 380 U.S. 609, 85 S. Ct. 1229, 14 L.Ed.2d 106 (1965). Steve further claims a new

trial is required because of certain incriminating hearsay statements elicited by the prosecutor in violation of *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L.Ed.2d 476 (1968). We affirm.

I

BACKGROUND

Ardie and Steve Rahseparian are the sons of Jack Rahseparian. At the time of the conduct for which they were charged, Steve resided in Altoona, Pennsylvania, Ardie resided in Fort Smith, Arkansas, and Jack resided and worked in Shawnee, Oklahoma. The government contended at trial that Ardie and Steve Rahseparian formed Genesis Marketing, a telemarketing company, through which they and their father conspired to commit and did commit mail fraud from May 1994 to May 1995. The government further successfully argued that Ardie, Steve, and Jack Rahseparian laundered the proceeds from the telemarketing scheme through Jack's business checking accounts.

Brad Russell, the company's only employee other than the Rahseparians themselves, testified on behalf of the government. Mr. Russell was a personal friend of Ardie. The two worked out of Ardie's apartment in Fort Smith as the sole telemarketers for Genesis Marketing. Mr. Russell testified that he and Ardie would entice customers over the telephone to buy products, such as water purifiers and "Say No to Drugs" kits, at highly inflated prices in exchange for a guaranteed valuable prize. Those customers never received their promised prizes, however, and many did not even receive their purchased product. It is on this basis that the government argued the Rahseparians conspired to commit and did commit mail fraud, and that they laundered the proceeds.

Submitting no evidence, the Rahseparians' defense relied on the theory that Ardie and Steve never intended to commit fraud but rather intended only to run a legitimate telemarketing business. Thus, the sole issue at trial was the defendants' intent. To prove this element, the government offered evidence of the unusual business practices of the Rahseparians, mainly through the testimony of Mr. Russell regarding the "pitch" he and Ardie used when contacting potential customers. Mr Russell testified that they would begin a solicitation by giving a false name and informing the potential customer that he or she was selected to receive one of five prizes, then listing four valuable prizes and one prize which was always much cheaper in value than the others.[1/] Mr. Russell and Ardie would then solicit the customers to purchase certain products at highly inflated prices in exchange for the prize. Mr. Russell further testified that he and Ardie directed customers to send their checks for the purchase price via Federal Express to a mail box located in Shawnee, Oklahoma.

The government established that these checks were deposited into three separate bank accounts: a business checking account at American National Bank in Shawnee, Oklahoma, established in the name of Jack Rahseparian's business; a business checking account at MidFirst Bank in Shawnee, Oklahoma, also established in the name of Jack's business; and a joint checking account at the MidFirst Bank established in the names of Jack and Steve Rahseparian. Moreover, Mr. Russell testified that Jack called Ardie every day or every other day to find out "how many checks to expect and how much they were." App.,

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[1/]The possible prizes promised to the customers included items such as a trip to Disneyland, a pound of gold, an ancient Spanish coin plaque, an appliance package, or a $3,500 award. The ancient Spanish coin plaque was considerably less valuable and was intended to be the award the customer received.

vol. II at 546. Mr. Russell also testified that Jack picked up those checks from the mailbox and deposited them into his accounts.

Mr. Russell's testimony also established that each day after he and Ardie made the solicitations, they would forward information to Steve Rahseparian regarding the customers' names, the product purchased and the amount paid, and which cheaper prize had been mentioned to the customer. Steve was supposed to fill the orders and ship the cheap prize from Pennsylvania to the customers. Mr. Russell testified that, after a period, he and Ardie began receiving complaints from customers that they had not received their products or their prizes. He also testified that these complaints were reported to Steve. Although some customers ultimately received their purchased products, none received their promised prizes.

The government also offered evidence regarding other unusual business practices followed by the Rahseparians when conducting business through Genesis Marketing, including the use of aliases. The mail box located in Shawnee where the customers were directed to send their checks was provided by a commercial vendor called "The Copy Stop."[2/] The mail box was set up in the name "Steven Woods/Genesis Marketing." The Copy Stop's records indicated the local contact for the box was a person named "Jack," with a local telephone number of Jack Rahseparian's business. In addition, Genesis Marketing had a toll-free business number which serviced Ardie's residence in Ft. Smith. The government presented evidence that this number was originally established under the name "Lloyd Woods" and was later changed to "Steve Rah."

[2/]The record is not clear whether the business name was "The Copy Shop," or "the Copy Stop," and the parties refer to this business under both names.

Although the actual phone number was assigned to Fort Smith, the bill was sent to and paid for by Steve in Pennsylvania.

After hearing all of this evidence and reviewing the supporting documentary evidence, the jury returned a guilty verdict against all three defendants on the sixteen counts of conspiracy to commit mail fraud, mail fraud, and money laundering. Steve and Ardie moved for a judgment of acquittal, arguing there was insufficient evidence that they conspired to or intended to commit mail fraud, or that they intended to commit money laundering. The district court denied the motions, finding with respect to Steve and Ardie the evidence reflected that Ardie made misrepresentations to potential customers in an effort to receive highly inflated prices for products and continued the solicitations even after Ardie knew Steve was not sending the promised prizes, which was sufficient to uphold both of their convictions on all counts.

II

INSUFFICIENCY OF EVIDENCE

On appeal, Ardie contends the government failed to present sufficient evidence of their intent to commit these crimes. All parties agree that conspiracy, mail fraud, and money laundering are specific intent crimes. *See United States v. Boyd,* 149 F.3d 1062, 1067 (10th Cir. 1998) (money laundering requires specific intent to launder proceeds from a known unlawful activity); *United States v. Smith,* 133 F.3d 737, 742 (10th Cir. 1997) (mail fraud requires specific intent to defraud); *United States v. Blair,* 54 F.3d 639, 642 (10th Cir. 1995) (conspiracy requires specific intent to further the unlawful activity which is the object of the conspiracy). The government was thus required to prove Ardie specifically intended to defraud Genesis' customers, that he made an agreement to that end, and that he laundered the proceeds knowing they were obtained through an illegal activity.

To determine whether evidence is sufficient to uphold a conviction, "we examine, in a light most favorable to the government, all of the evidence together with the reasonable inferences to be drawn therefrom and ask whether any rational juror could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Arutunoff,* 1 F.3d 1112, 1116 (10th Cir. 1993). Moreover, we "accept the jury's resolution of conflicting evidence.... As long as the possible inferences are reasonable, it was for the jury, not the court, to determine what may have occurred." *United States v. Grissom,* 44 F.3d 1507, 1510 (10th Cir. 1995). We will not uphold a conviction, however, that was obtained by nothing more than "piling inference upon inference," *United States v. Fox,* 902 F.2d 1508, 1513 (10th Cir. 1990), or where the evidence raises no more "than a mere suspicion of guilt," *Smith,* 133 F.3d at 742.

We are not persuaded by Ardie's argument that the evidence was insufficient to show his knowing and intentional involvement in mail fraud. To establish his guilt, the government had to prove: (1) Ardie engaged in a scheme or artifice to defraud customers or to obtain money by means of false and fraudulent pretenses, representations or promises; (2) Ardie had the intent to defraud customers, and (3) Ardie used the United States mails or a commercial interstate carrier to facilitate that scheme. *See* 18 U.S.C. § 1341 (1994); *Smith,* 133 F.3d at 742.

With respect to the mail fraud, the jury heard direct testimony from Lorenzo Pitts that Ardie contacted him promising a $300,000 reward for his community involvement with children in exchange for a $2,989 registration fee. Although Mr. Pitts sent the money to Genesis Marketing in Shawnee and it was deposited into Jack's business accounts, Mr. Pitts never received the promised $300,000. The jury also heard evidence from other customers as well as from Mr. Russell that Ardie

contacted potential customers and enticed them to purchase products at highly inflated prices in exchange for a promise of prizes which he knew were not being sent. This evidence was sufficient for a jury to make the reasonable inference that Ardie intentionally defrauded Mr. Pitts, as well as the other customers. *See Smith,* 133 F.3d at 743.

Under 18 U.S.C. § 371, a conviction for conspiracy requires the government to prove: (1) the defendant's agreement with another person to violate the law; (2) his knowledge of the essential objective of the conspiracy; (3) his knowing and voluntary involvement; and (4) interdependence among the alleged coconspirators. *See United States v. Edwards,* 69 F.3d 419, 430 (10th Cir. 1995). Stated simply, Ardie's conviction for conspiracy required the government to prove Ardie had an explicit or implicit agreement with Steve or Jack to commit mail fraud. In this regard, the government presented abundant evidence of the collaboration between Ardie and Steve on how Genesis Marketing was to be run. The inference that they explicitly or implicitly agreed to defraud customers was a reasonable one for the jury to make.

Ardie cites us to *United States v. Migliaccio,* 34 F.3d 1517 (10th Cir. 1994), for the proposition that where the evidence only shows the defendants were involved in a lawful business activity together, it is insufficient for the jury to infer a criminal agreement. In contrast to the facts in *Migliaccio,* however, the jury here was presented with evidence permitting the reasonable inference that Ardie knew Genesis Marketing was not a lawful business. Genesis Marketing's support services were set up under various aliases, its income was sent to a distant location unconnected in any way with its business operations, its profits were deposited into checking accounts also unrelated to the business, and customers were constantly notifying Ardie that they were not receiving their products or their prizes. *See, e.g., United States v. Gray,* 105 F.3d 956, 965

(5th Cir. 1997) (sufficient evidence to uphold conviction for mail fraud and conspiracy where organizer of fraudulent telemarketing scheme concealed his role through the use of false identities, aliases, and intermediaries). In short, there was ample evidence from which a reasonable jury could infer that Ardie knew the business in which he was involved was unlawful, and that Ardie and Steve made a criminal agreement to commit mail fraud through Genesis Marketing. The holding of *Migliaccio* simply does not apply in these circumstances.

The jury also heard sufficient evidence to allow it to convict Ardie of money laundering. To establish his guilt for money laundering under 18 U.S.C. § 1956, the government was required to prove: (1) Ardie knowingly conducted a financial transaction; (2) he knew the funds represented proceeds of an unlawful activity; (3) the funds actually did represent the proceeds of the unlawful activity; and (4) the transaction was designed to conceal the nature, location, source ownership or control of the proceeds. 18 U.S.C. § 1956(a)(1)(B)(i) (1994). The evidence presented showed that Ardie had the income from the mail fraud sent to a mail box in Shawnee where his father would pick it up and deposit it into different checking accounts, none of which were connected with Genesis Marketing. The jury could make the reasonable inference from this evidence that these transactions were designed to "conceal the nature, location, source ownership or control of the proceeds" of the income from Genesis Marketing.

Consequently, the district court properly denied Steve and Ardie Rahseparian's motions for judgment of acquittal.

III

GRIFFIN CHALLENGE

In *Griffin v. California,* 380 U.S. 609, 85 S. Ct. 1229, 14 L.Ed.2d 106 (1965), the Supreme Court held that the Fifth

Amendment privilege against self-incrimination prohibits a prosecutor from commenting on a defendant's invocation of his right not to testify. *See id.* at 615, 85 S. Ct. 1229. The *Griffin* rule is violated when a prosecutor uses language which is "manifestly intended" to be a comment on the defendant's failure to testify or "of such character that the jury would naturally and necessarily" take it to be such a comment. *United States v. Barton,* 731 F.2d 669, 674 (10th Cir. 1984) (quoting *Knowles v. United States,* 224 F.2d 168, 170 (10th Cir. 1955)).

During closing arguments in this case, the prosecutor told the jurors they would have to use their common sense to infer a criminal agreement between the Rahseparians "[b]ecause here we don't have an inside person, we don't have one of the three members here at the counsel table." App., vol. III at 743. The Rahseparians contend this was a comment by the prosecutor on the exercise of their Fifth Amendment rights in violation of *Griffin.* The government argues the prosecutor was merely asking the jurors to infer a criminal agreement based on the evidence presented. At most, the comment was aimed only at the conspiracy charge.

The prosecutor's closing argument spanned twenty pages of transcript, most of which went to the conspiracy charge. Regarding the agreement element of conspiracy, the prosecutor told the jurors they could find such an agreement absent express proof as long as they believed there was an understanding between the Rahseparians to commit mail fraud. She outlined the evidence presented regarding the mailbox, the Federal Express account, the 1-800 telephone number, and the products that were ordered. On the eighth transcribed page of her argument, she returned to the issue of the required criminal agreement and reiterated that the government was not required to prove a formal agreement. It was in this context that the prosecutor made the comment in question:

> The Court instructed you not to leave your common sense at home, and I would ask you to do the same thing, particularly when we talk about the area here of an agreement and what these defendants agreed upon. *Because here we don't have an inside person, we don't have one of the three members here at the counsel table.* Here is what I would like you to do is use your common sense, and as I go through these items, to think, is it reasonable that these defendants wouldn't have talked to each other, that they wouldn't have come to some type of agreement or understanding.

Id. at 743 (challenged comment emphasized). The prosecutor then discussed in detail all of the evidence referred to above, and completed her argument as to the conspiracy charges by asserting, "[t]here had to have been discussions, and the evidence, you may infer, is that these defendants did indeed have an agreement. And this agreement was to engage in criminal activity." *Id.* at 748. Her argument went on to cover the charges of mail fraud and money laundering before concluding seven transcribed pages later.

In response to the Rahseparians' objections, the district court held the challenged statement was not a comment on the defendants' failure to testify, but rather a concession of a flaw in the government's case caused by the lack of direct testimony evidencing a criminal agreement. The district court pointed to the full context of the prosecutor's argument in support of this interpretation. *See* App., vol. I, at 198. The district court denied counsel's request for a curative instruction. In its subsequent written order overruling the objection, the court stated that even assuming this comment was intended or was taken by the jury as a comment on the defendants' failure to testify, its normal instructions to the jury on the defendant's right to remain silent made the isolated comment harmless. *See id.*

We have consistently held that a prosecutor may comment on the lack of evidence in a case, *see, e.g., United States v. Gomez-Olivas*, 897 F.2d 500, 503 (10th Cir. 1990) (prosecutor is allowed considerable latitude in commenting on evidence and arguing inferences therefrom), as long as she does not comment on the failure of the defendant to provide such evidence, *see Knowles v. United States*, 224 F.2d 168, 170 (10th Cir. 1955) ("[I]t is perfectly proper to comment on the lack of evidence if [the prosecutor] didn't comment on the failure of the defendant to give it."). The circuit courts that have been presented with comments such as the one challenged here have split on whether they are improper comments under the *Griffin* rule or permissible statements regarding the lack of direct evidence.

For example, in *Jacobs v. United States*, 395 F.2d 469 (8th Cir. 1968), four co-defendants were tried for conspiracy to violate bankruptcy laws and commit mail fraud. They offered no testimony in their defense. During rebuttal arguments, the prosecutor asserted, "Where is [the missing merchandise].... [T]here are only four people in this room that know — just four — and they are not about to tell us." *Id.* at 477. The Eighth Circuit held that this comment was a proper rebuttal comment to the defense's attack on the lack of direct testimony on the issue and not a *Griffin* violation. *See id.* In *United States v. Griggs*, 735 F.2d 1318 (11th Cir. 1984), on the other hand, the prosecutor argued to the jury in closing, "[defense counsel] asked you to assume that [element of the defense] even though the defendant has not testified about it." *Id.* at 1320. The Eleventh Circuit found the comment "an unmistakable reference to Griggs' exercise of his fifth amendment privilege. The jury could not have failed to comprehend the remark in any other way." *Id.* at 1324.

In *Berryman v. Colbert*, 538 F.2d 1247 (6th Cir. 1976), the prosecutor made similar comments that were held impermissible under the *Griffin* rule. The defendants there

were convicted in state court of robbery, conspiracy to commit robbery, and murder. In closing arguments, the prosecutor stated, "we are relying almost entirely upon circumstantial evidence. Nobody was there when the robbery took place. Nobody that we can bring here to testify. The defendants here, yes, but we can't get them to testify." *Id.* at 1249. The Sixth Circuit found the comment "to be in square violation of *Griffin v. California*." *Id.* at 1250.

This court has found more benign "innuendos" than these to be violations of *Griffin*. In *Barton*, we held the prosecutor impermissibly commented on the defendants' failure to testify by merely pointing to certain facts which were not explained, when those facts could only be explained by the defendants. *See Barton*, 731 F.2d at 674; *see also Knowles*, 224 F.2d at 170 (assuming without deciding that such a comment was improper). The prosecutor here not only pointed to the lack of direct evidence of the agreement, a fact only the Rahseparians would have evidence of, but further specifically stated the government did not have testimony from the defendants as to that fact.

"The prosecution is entitled to refer to the fact that the defense has failed to rebut a natural inference that may be drawn from the facts in evidence." *Griggs*, 735 F.2d at 1323. In this case, the prosecutor certainly could have permissibly argued to the jury that it should infer there was an agreement. "Arguing inferences is standard business among lawyers, which *Griffin* does not forbid." *Gomez-Olivas*, 897 F.2d at 503. The prosecutor here went one step further, however. Rather than merely argue the inferences which could reasonably be drawn from the evidence, she asserted that the inference should be made precisely because the defendants did not testify. This comment teeters on the fine line between an impermissible comment on the defendants' failure to testify and a permissible comment on the lack of evidence in a case.

We are likewise in equipose as to how the jury must have necessarily taken this statement. The Rahseparians argue this remark suggested to the jurors that inculpatory evidence was kept from them due to the Rahseparians failure to testify. We do not agree that such a negative inference is a necessary result of this comment. The prosecutor argued to the jury that an inference must be made because there was no direct testimony, which is not unconstitutional. She contended the only reasonable inference to be made in light of all the evidence was that there was a criminal agreement. Her challenged comment standing alone, however, allowed the jury to make any inference, including that there was no criminal agreement.

Determining whether this comment violated the Constitution is problematic in light of the fact that the prosecutor's comment was situated within lengthy but focused arguments regarding the inferences to be made from the evidence presented, and the meaning of the comment is unclear. Given its context and in light of the evidence against Steve and Ardie, we are convinced that even if there was error, it was harmless beyond a reasonable doubt.

The Supreme Court has directed that where the prosecutor makes an impermissible statement under *Griffin,* the government must "prove beyond a reasonable doubt that the error ... did not contribute to the verdict obtained" to maintain the conviction against the accused. *Chapman v. California,* 386 U.S. 18, 24, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967). When conducting a harmless error analysis, we review the entire record. *See United States v. Hasting,* 461 U.S. 499, 509 n.7 & 510, 103 S. Ct. 1974, 76 L.Ed.2d 96 (1983).

The Rahseparians argue that the prosecutor's comments here went to the pivotal inferences the jury must have made to convict them. As such, the comments necessarily were the basis on which the jurors found them guilty. They additionally

argue that in light of the circumstantial nature of the case against them, the comments cannot be found harmless beyond a reasonable doubt. The government argues that because the jury was adequately instructed on the weight to be given closing arguments, the government's burden of proof, and the defendant's right to remain silent, the single, isolated comment challenged by the Rahseparians could not have infected the jury's deliberations.

Because the comment here was pointed to the conspiracy charges, our harmless error analysis is complicated by the fact that the evidence as to the criminal conspiracy was entirely circumstantial. In *Chapman,* the Supreme Court held it could not find the prosecutor's impermissible statements harmless beyond a reasonable doubt where all of the evidence in the case was circumstantial. The prosecutor there, however, was working under the California constitutional provision struck down in *Griffin* which allowed such commentary. *Chapman,* 386 U.S. at 19, 87 S. Ct. 824. Thus, the Court was dealing with a case where both the prosecutor's comments and the trial court's jury instructions "continuously and repeatedly" impressed upon the jury that they should draw inferences in favor of the state due to the defendants' silence. *See id.* at 25, 87 S. Ct. 824. The state's case coupled this continuous reliance on the defendants' silence as evidence of guilt with "a reasonably strong 'circumstantial web of evidence.' " *Id.* The Court concluded that looking solely to the circumstantial evidence presented, "honest, fair-minded jurors might very well have brought in not-guilty verdicts." *Id.* at 25-26, 87 S. Ct. 824. The Court held that under these circumstances it was completely impossible to find beyond a reasonable doubt the error did not contribute to the defendants convictions. *See id.* at 26, 87 S. Ct. 824.

In *Berryman,* 538 F.2d 1247, the defendant had been convicted of murder and conspiracy to commit robbery. The

conspiracy conviction there was supported by a substantial amount of direct evidence, whereas the murder conviction was based entirely on circumstantial evidence. After finding the prosecutor's statements at trial impermissible under *Griffin*, the Sixth Circuit held the error harmless beyond a reasonable doubt as to the conspiracy conviction since the proof there was "direct, positive and undisputed." *Id.* at 1250. The court held to the contrary on the murder conviction stating:

> although we recognize that an appropriate cautionary instruction on the right of the defendant to remain silent was given, we do not feel that it could have cured the effect of the prejudicial and improper comment above as to the murder charge. The proofs of appellant's participation in the murder itself arise solely from circumstance and inference. In such a case properly termed "weak" by the District Judge we cannot consider the prosecutorial misconduct to be harmless beyond reasonable doubt.

Id.

This court has also stated that the entirely circumstantial nature of the government's case normally weighs against a finding of harmless error. *See Velarde v. Shulsen*, 757 F.2d 1093, 1095 (10th Cir. 1985). In *Velarde*, we held the prosecution's impermissible comments on the defendant's post-arrest silence (so-called "Doyle" errors) not harmless because the trial lasted only one morning, the prosecution's case was entirely circumstantial, and the trial court did not give a curative instruction. *See id.* at 1095-96.

Although the convictions in the present case were based on circumstantial evidence, the trial was not short. The Rahseparian's joint trial consisted of three full days of testimony, and one full day of closing arguments and instructions, with the jury returning a guilty verdict on all counts the fifth day. Despite the circumstantial nature of the

government's case, we are convinced that the trial and particularly the lengthy closing arguments during which the prosecutor directed most of her comments towards the reasonable inferences that should be drawn from the evidence made any *Griffin* error harmless.

In this case the district court instructed the jury on the weight to be given closing arguments, the government's burden of proof, and the defendants' right to remain silent. *See* Jury Instructions, app., vol. I, at 51, 53, 58.[3/] In *United States v.*

[3/]Instruction No. 6 stated:

> The burden of proving a defendant guilty beyond a reasonable doubt that rests upon the government and never shifts throughout the trial. The law does not require a defendant to prove innocence or to produce any evidence. He may rely on evidence brought out on cross-examination of witnesses for the government, or the presumption of innocence, or the weakness of the government's case, or favorable inferences casting doubt on guilt, or any of these.
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> Instruction No. 8 stated:
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> . . . You are to consider only the evidence in the case; but, in your evaluation of the evidence, you are not limited to the bald statements of witnesses. In considering the evidence and in determining the issues in this case, you should bring to your aid the general knowledge that you possess, your understanding of the ways of the world, and your common sense.
>
> Instruction No. 13 stated:
>
> The Constitution of the United States grants to a defendant the right to remain silent. No inference of guilt may be drawn by any juror from the fact that a defendant does not take the witness stand and testify. It is the government's obligation to prove guilt and a

Hernandez-Muniz, 170 F.3d 1007, 1011-12 (10th Cir. 1999), we held that a single, vague reference to the defendant's failure to testify was not plain error where the trial court instructed the jury on the defendant's Fifth Amendment rights. *See also Jacobs*, 395 F.2d at 477-78 (jury instructions held to remove any possible prejudice stemming from *Griffin* error). Similarly, the jury instructions here help to convince us that, given the evidence in this case, the allegedly erroneous comment was harmless beyond a reasonable doubt.

IV

BRUTON CHALLENGE

In *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L.Ed.2d 476 (1968), the Supreme Court held that in a joint trial, one defendant's "powerfully incriminating extrajudicial statements" regarding a co-defendant violate the co-defendant's Sixth Amendment rights, despite instructions to the jury to disregard that evidence when determining guilt. *Id.* at 1628. Steve Rahseparian contends such an error occurred here. We review this legal issue *de novo*. *See United States v. Verduzco-Martinez*, 186 F.3d 1208, 1212 (10th Cir. 1999).

During the government's case in chief, IRS Agent Sharon Morisette testified that Ardie indicated he was initially reluctant to enter into business with Steve because "[Ardie] said that he didn't trust his brother." App., vol. III at 658. The district court immediately asked the jury to leave the courtroom, and during sidebar held the statement was in violation of the *Bruton* rule. Defense counsel moved for a mistrial, or in the alternative that the court instruct the jury to disregard the statement. The court denied the request for a mistrial but struck the statement

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defendant has no obligation to speak. Further, during deliberation, no juror may make any reference to a defendant's decision not to testify.

from the record, instructed the jury to disregard the statement, and then polled each juror individually to ascertain if he or she could follow the curative instruction. Steve Rahseparian argues that Officer Morisette's statement was covered by the protection of *Bruton* because it was critical to the prosecution's case, inculpatory towards him, and allowed the jury to infer he is the type of person who would have the intent to commit fraud and launder money, the key issues in this case.

We are not convinced the statement here is one to which the narrow *Bruton* rule applies. In *Bruton,* the Supreme Court held that the co-defendant's confession, which directly implicated Mr. Bruton and was hearsay as to him, was so powerfully incriminating that the Court could not disregard the substantial risk the jury would consider the testimony despite instructions not to do so. *See Bruton,* 391 U.S. at 126-28, 135, 88 S. Ct. 1620. However, the Court cautioned against a broad application of its holding, stating that in many cases the jury can and will follow the trial judge's instructions to disregard the information. *See id.* at 135, 88 S. Ct. 1620; *Richardson v. Marsh,* 481 U.S. 200, 207, 107 S. Ct. 1702, 95 L.Ed.2d 176 (1987) (*Bruton* 's holding is a narrow exception to the general principle that jurors will follow their instructions). *Bruton* applies only in those few contexts where the statement is so inculpatory as to the defendant that the "practical and human limitations of the jury system cannot be ignored." *Bruton,* 391 U.S. at 135, 88 S. Ct. 1620.

The Supreme Court has rejected extending the *Bruton* rule to statements that are not directly inculpatory but only inferentially incriminating. *See Richardson,* 481 U.S. at 208, 107 S. Ct. 1702. In *Richardson,* Ms. Richardson and Mr. Williams were co-defendants in a joint trial. Mr. Williams confessed to robbery and murder and admitted to discussing the crimes while driving in a car prior to committing them. That confession did not refer in any way to Ms. Richardson and was

admitted into evidence. Later in the trial, testimony revealed Ms. Richardson was in the car while the conversation took place. In holding that *Bruton* did not apply to Mr. Williams' confession, the Court stated:

> Where the necessity of such linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence. Specific testimony that "the defendant helped me commit the crime" is more vivid than inferential incrimination, and hence more difficult to thrust out of mind.... [W]ith regard to inferential incrimination the judge's instruction may well be successful in dissuading the jury from entering onto the path of inference in the first place, so that there is no incrimination to forget.

Id. at 208, 107 S. Ct. 1702. *See also Gray v. Maryland,* 523 U.S. 185, 195, 118 S. Ct. 1151, 140 L.Ed.2d 294 (1998) ("*Richardson* placed outside the scope of *Bruton* 's rule those statements that incriminate inferentially."); *United States v. Chatman,* 994 F.2d 1510, 1513 (10th Cir. 1993) (inferential incrimination argument unavailing to show *Bruton* violation); *United States v. Markopoulos,* 848 F.2d 1036, 1039 (10th Cir. 1988) (same). The statement at issue here, that Ardie did not trust his brother Steve, is at most inferentially incriminating.

This conclusion is supported by *Gray,* where the Court determined whether a statement made by a co-defendant was accusatory as opposed to inferentially incriminating by assessing how direct and "vivid" the statement was and how quickly the jury could make a negative inference from it. *See Gray,* 523 U.S. at 196, 118 S. Ct. 1151. Only where the inculpatory inference can be made immediately in the mind of a reasonable juror is the statement protected by *Bruton* and any curative instruction insufficient. *See id.* Certainly the

immediate inference from Ardie's sibling mistrust is not his brother's intent to commit criminal acts.

Steve Rahseparian contends his brother's mistrust was "critical" to the government's case, relying on *United States v. Glass*, 128 F.3d 1398 (10th Cir. 1997). In *Glass*, we held *Bruton* applied to a co-defendant's statement to police that was not facially or directly inculpatory but revealed the familial relationship between the defendants, a fact critical to the prosecution's case. Contrary to the situation in *Glass*, Ardie's initial feelings towards his brother were not "obviously important" to the government's case. *See id.* at 1405.

For these reasons, we are persuaded the district court's curative action, which struck the statement from the record and instructed the jurors to disregard it, cured any possible prejudice it may have caused Steve.[4]

V

CONCLUSION

For the reasons stated above, we **AFFIRM** Steve and Ardie Rahseparian's convictions on all counts.

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[4]Steve also argues that even if the *Bruton* and *Griffin* errors were harmless by themselves, cumulatively they were prejudicial. Because we conclude no *Bruton* error was committed, a cumulative error analysis is inappropriate. *See United States v. Rivera*, 900 F.2d 1462, 1470-71 (10th Cir. 1990).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMEMCA,

Plaintiff – Appellee,

v.

DARYOUSH RAHSEPARIAN, also known as Steve Rahseparian,

Defendant – Appellant.

No. 99-6050

ORDER

Filed January 2, 2001

Before SEYMOUR, TACHA and BRISCOE,Circuit Judges.

This matter is before the court on the Appellant's Motion to Stay the Mandate Pending the Filing and Disposition of a Petition for Writ of Certiorari. The Appellant's motion is GRANTED.

Entered for the Court

PATRICK FISHER, Clerk of Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

JALAL (JACK) RAHSEPARIAN, DARYOUSH (STEVE) RAHSEPARIAN, ARDSHIR (ARDIE) RAHSEPARIAN,

Defendants.

CR-98-0070-A

VOLUME THREE

REPORTER'S TRANSCRIPT OF TRIAL PROCEEDINGS HAD ON WEDNESDAY, JULY 15, 1998 UNITED STATES COURTHOUSE OKLAHOMA CITY, OKLAHOMA

BEFORE: THE HONORABLE WAYNE E. ALLEY, U.S. DISTRICT JUDGE

(Sitting with a Jury)

Q And did he voluntarily then speak with you, Agent Morissette?

A Yes, he did.

Q And did you ask him about Genesis Marketing?

A Yes.

Q And what did he tell you?

A He told me that he was employed as a sales rep for Genesis Marketing for a period of time.

Q And did he tell you about — anything about the initiation of it or the start-up of it?

A Yes, he did.

Q What was that?

A He said that he had been asked to make phone calls — to make sales calls for the company by his brother Steve.

Q And did he express that before the start-up that he expressed any hesitation?

A Yes. He said that he was reluctant to get involved.

Q And why was that?

A He said that he didn't trust his brother —

MR. BOX: Your Honor, —

THE COURT: Well, ladies and gentlemen, you'll be accompanying Miss Boese to the jury room below.

(JURY RECESSED. THE FOLLOWING PROCEEDINGS WERE HAD BETWEEN COURT AND COUNSEL OUTSIDE THE PRESENCE AND HEARING OF THE JURY:)

THE COURT: All right. The jury has departed.

Well, the Bruton problem has arisen, if in the interview of one defendant something incriminating is said by him concerning another defendant. It certainly seems to me that an expression of general mistrust, "I don't want to go into business," is awfully close to that.

MRS. POARCH: Your Honor, the statement I was attempting to elicit is here listed in the memorandum of interview, if I may be allowed just to read it.

THE COURT: Yes.

MRS. POARCH: The statement was, "Ardie said that he was unsure about whether Steve actually intended to deliver the goods." It wasn't a — any type of statement about what Steve said, it was just an explanation for his hesitancy to become involved.

THE COURT: That is incriminating, and I don't know what to do about it. What am I supposed to do about it, Mr. Box?'

MR. BOX: Well, Your Honor, in the previous request by me at the bench prior to this witness being given direct examination, I thought it was my understanding the Court had directed the witness not to —

THE COURT: Well, I didn't, I asked Miss Poarch to.

MR. BOX: Your Honor, I think it's a response directly in contradiction to your directive, Your Honor.

THE COURT: Well, not only the response but the question; right?

MR. BOX: I would move for a mistrial.

THE COURT: Anybody else have something to say about this?

MR. THOMAS: Only that a lesson learned, as far as Jack, so that everybody knows, I think the Court heard my request that your direction be given concerning my client in the future.

MR. BOX: The only other request, Your Honor, if the Court feels like it can adequately cure the problem by instructing the jury to disregard the last statement made and then also to make

it perfectly clear, again, that the type of response and questions would not happen again, that maybe adequate safeguards could be given.

THE COURT: Mrs. Poarch?

MRS. POARCH: Your Honor, I apologize to the Court, I did not intend to elicit that. We have worked extensively in fine-tuning and gearing this statement only to what Ardie has acknowledged about his own conduct and activity, and I regret if I asked it in such a way that misled the witness. I don't believe that Agent Morissette intended in any way to do anything improper, and I apologize to the Court if I didn't artfully ask the question.

THE COURT: Well, it seems to me the whole colloquy specifically calls upon Special Agent Morissette in that question to explain why it is that Ardie Rahseparian was reluctant to enter into this in the first place.

And certainly ought to be able to see that if the answer is "Well, gee, I don't know whether my brother Steve would deliver the goods or not," failing to deliver the goods is at the very core of the criminal enterprise that's alleged here. So it looks like a very, very clear case.

In the absence of the jury, I'd have to say this: Sometimes I'm tempted after a few days of trial, a counsel moves for mistrial, to simply say, "granted," get up, walk out, and see how everybody reacts. It would be probably, "No, no, I beg you, Judge, let's carry on," since we've been here this far. But I'm not going to grant a mistrial.

I will strike the reference to Mr. Steve Rahseparian in the question and answer; and then after telling the jury to disregard it and that it may play no role in their deliberations, and poll them one by one to ascertain if in their view they can follow my instructions.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

DARYOUSH RAHSEPARIAN, also known as Steve Rahseparian,

Defendant – Appellant.

No. 99-6050

ORDER

Filed December 21, 2000

Before **SEYMOUR, TACHA,** and **BRISCOE** Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by:
Deputy Clerk